SUPREME COURT, U.S.
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No.

In the

Supreme Court of the United States

GEORGE H. SEYMOUR,

Petitioner,

v.

W. ANDREW REESE, M.D., Individually and in his capacity as Medical Director of the Pamunkey Regional Jail,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Scott Gregory Crowley
Counsel of Record
CROWLEY & CROWLEY
7201 Glen Forest Drive
Richmond, Virginia 23226
(804) 282-5303
Counsel for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

I. IN PETITIONER'S CIVIL ACTION UNDER 42 U.S.C § 1983 FOR INADEQUATE MEDICAL TREATMENT AS A PRE-TRIAL DETAINEE UNDER THE 14TH AMENDMENT, WAS SUMMARY JUDGMENT IMPROVIDENTLY GRANTED IN THE FACE OF DOCUMENTATION THAT (1) RESPONDENT WILFULLY IGNORED PETITIONER'S REGULAR PHYSICIAN'S INSTRUCTIONS TO ADMINISTER MORPHINE TO MANAGE THE INTENSE PAIN ASSOCIATED WITH A DEGENERATIVE BONE DISEASE, (2) WILFULLY IGNORED PETITIONER'S AGONIZED PLEAS FOR SUCH MEDICINE, AND SUBSTITUTED HIS OWN JUDGMENT THAT PETITIONER DID "NOT APPEAR TO BE IN PAIN," (3) CAUSED PETITIONER TO SUFFER UNNECESSARY NATURAL PAIN AND NEARLY UNBEARABLE WITHDRAWAL PAIN, AND (4) THEN ABRUPTLY REVERSE COURSE TEN DAYS LATER AND OVERDOSE PETITIONER WITH THREE TIMES THE PRESCRIBED QUANTITY OF MORPHINE.

II. SHOULD THIS COURT RESOLVE A DIVISION AMONG THE CIRCUIT COURTS OF APPEAL IN FACTUALLY-SIMILAR CASES REGARDING WHETHER THE REQUISITE LEVEL OF "DELIBERATE INDIFFERENCE" IS MET WHEN A JAIL PHYSICIAN'S JUDGMENT DIFFERS FROM THAT OF THE TREATING PHYSICIAN, SUCH THAT HARM IS CAUSED TO THE PRE-TRIAL DETAINEE.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit dated December 5, 2001, is set forth in the Appendix, p. 1a. The opinion of the United States District Court for the Eastern District of Virginia dated March 30, 2001 is set forth in the Appendix, p. 4a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fourth Circuit issued its Decision in this case on December 5, 2001. This Petition was timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Fourteenth Amendment, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

On October 20, 2000, George H. Seymour (hereinafter the "Petitioner"), a resident of the Eastern District of Virginia, filed his civil action against W. Andrew Reese, M.D. (hereinafter the "Respondent") under 42 U.S.C. § 1983 seeking monetary damages for physical and emotional injuries resulting from the inadequate medical treatment while a pre-trial detainee, claiming deprivation of his due process rights under color of state law in violation of the Fourteenth Amendment to the United States Constitution. The suit alleged that the Respondent, individually and in his capacity as medical director of the Pamunkey Regional Jail in Hanover, Virginia, ignored the instructions of Petitioner's physician and for a period of ten days unreasonably refused to administer prescription pain medication, which Petitioner's regular physician indicated he required constantly to manage chronic and intense pain resulting from a degenerative bone and joint disease.

On February 20, 2001, Respondent filed a Motion for Summary Judgment, asserting that the Petitioner's allegations did not rise to the level of "deliberate indifference," the standard required by decisions of this Court for reviewing claims of constitutional deprivation of adequate medical attention under the Fourteenth Amendment. Respondent appended as exhibits to its Motion his affidavit, those of other jail medical personnel, and relevant portions of Petitioner's medical records. On March 5, 2001, Petitioner filed his Memorandum in Opposition to the Motion for Summary Judgment, along with his affidavit and additional medical records that asserted established his need for aggressive pain management and his written requests that he be given his morphine. On March 23, 2001, a hearing was conducted before Senior District Judge Richard L. Williams of the U.S. District Court for the Eastern District of Virginia. The District Court granted Petitioner leave pursuant to Rule 56(f), Fed. R. Civ. P. to obtain the affidavit of Petitioner's regular

physician, Hillary S. Hawkins, M.D., and to take the depositions of Respondent and his assistant. On March 30, 2001, Judge Williams entered an Order granting Respondent's Motion for Summary Judgment, dismissing the action with prejudice. A Memorandum Opinion of same date was issued justifying the decision. The Order and Memorandum Opinion are set forth herewith in the appendix.

On April 26, 2001, the Petitioner filed a timely Notice of Appeal to the Fourth Circuit Court of Appeals. That court affirmed the District Court's decision on December 5, 2001.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

Statement of the Facts

A review of the facts in a light most favorable to the Petitioner reveals the following. The Petitioner was jailed at the Pamunkey Regional Jail in Hanover, Virginia under a *capias* for failure to appear in the Hanover County Circuit Court on October 20, 1998. The reason for the failure to appear – which is relevant to the Petitioner's claims in this action – was that he was hospitalized that day and the day prior for pain and complications stemming from his avascular neuroses and an impending hip replacement.

The Petitioner heard through his attorney of the *capias* and reported to the Jail the evening of October 20, 1998. Concerned about being detained with his medical condition, Petitioner brought with him his medical records from the hospitalization and delivered these to the jail medical staff. These records clearly identified his medical condition and the need for morphine, a narcotic pain medication. The records also clearly indicated that Petitioner was taking other medications for his emotional condition and taking medication usually prescribed to Parkinson's disease patients in order to combat his "shaking leg"syndrome. In

addition, Petitioner himself explained to the personnel his condition and his need for aggressive pain management.

Despite this forewarning and medical documentation, the Physician's Assistant Peter Ober prescribed Petitioner only Motrin 800 – a non-narcotic with far less pain relief effect – pending examination by Respondent. Ober also instructed the nurses not to administer any of the other medications, considering them not needed "asap."

The next day, October 21, 1998, the nursing staff called a Dr. Wilson, one of Petitioner's physicians, who confirmed that he was "currently being worked up for a hip replacement" and had been prescribed MS Contin (a pill form of synthetic morphine) for the pain caused by a previous hip replacement and was now experiencing a "loosening of the joint."

Petitioner was examined October 23, 1998 by Respondent, who noted that Petitioner "had a history of multiple deteriorating joints and had had hip replacements in both hips." Respondent also noted that Petitioner was due "for a revision of the hip replacement of his right hip in the near future." Despite this assessment, as well as Petitioner's complaints of being in pain, Respondent concluded that Petitioner did "not appear to be in pain" and instructed the continuation of the Motrin 800. The prescription given by Respondent to continue the Motrin 800 went against the prescription of Petitioner's physician, which had already been confirmed by Dr. Wilson and included in the nursing staff's notes, that Petitioner be given MS Contin. On October 26, 1998, Petitioner completed a Jail form to complain of extreme pain and the inadequacy of the Motrin. By this time, Petitioner was most certainly suffering from the sudden withdraw from his prescription medicine. The response noted on the form by the nursing staff was that Petitioner had already been evaluated by the jail physician and they were awaiting his medical records.

On October 26, 1998, after being informed of Petitioner's poor treatment at the jail, his physician, Dr. Hillary Hawkins, wrote a letter that was delivered to the jail the same day by one Tammy Belcher. In this letter, Dr. Hawkins stated that Petitioner suffers from "very severe, chronic pain, disability due to degenerative joint disease." Dr. Hawkins goes on to state that Petitioner had been prescribed MS Contin, and recommended that he continue to be treated with 15 milligrams of MS Contin every 12 hours.

Again on October 29, 1998, Petitioner completed a written medical request form to complain of the excruciating pain.

Despite these documented complaints, Respondent found that Petitioner "does not appear to be in any pain" when he re-evaluated him on October 30, 1998. Notwithstanding this assessment, Respondent reversed course and agreed that day to prescribe the MS Contin "per recommendation of Dr. Hawkins." Rather than call Dr. Hawkins, however, Respondent asked Petitioner himself, who was then suffering from withdrawal symptoms, what dosage he should prescribe, and proceeded to prescribe 30 mg. three times per day. This prescription was three times more than the amount prescribed to Petitioner by Dr. Hawkins.

Pursuant to Jail regulations, the medication has to be ordered from a mail order pharmacist, so that not until November 3, 1998 is any morphine administered. As a result, Petitioner completed his third written medical request form on November 3, 1998 again complaining of the intense pain (JA 136). When the medicine is finally administered, the amount effectively overdosed Petitioner, inducing hallucinations.

In her affidavit, Dr. Hawkins, stated that "in my professional opinion, the Motrin 800 that Petitioner was given at the Jail was very ineffectual for combating [that] type of pain." Dr. Hawkins also stated that "Most patient[s] taking

MS-Contin for as long and regularly as Mr. Seymour would suffer severe withdrawal symptoms, including intense pain, from an abrupt stopping of the medicine." Dr. Hawkins goes on to state "I believe that restarting Mr. Seymour's MS-Contin after two weeks is highly suspect, given that Dr. Reese believed that Mr. Seymour suffered little or no pain, and given that the dosage prescribed was three times the amount I had indicated." Dr. Hawkins concludes her affidavit by stating "It is my professional opinion that the withholding of pain management medication, and subsequent over-prescription of medication, is beyond simple negligence and would constitute deliberate indifference."

Despite the numerous material facts in genuine dispute, including medical opinion that Respondent's medical treatment of Petitioner was inadequate and reached the level of "deliberate indifference," both the District Court and the Court of Appeals substituted their reason for the trier of fact, and found that the facts did not establish a constitutional deprivation.

REASONS FOR GRANTING THE WRIT

I. SUMMARY JUDGMENT IN THIS CASE WAS INAPPROPRIATE SINCE VIEWING THE EVIDENCE PRESENTED IN THE AFFIDAVITS AND MEDICAL RECORDS IN THE LIGHT MOST FAVORABLE THE PETITIONER INDICATE THAT (1) HE HAD A SERIOUS MEDICAL NEED REQUIRING INTENSE PAIN MANAGEMENT, (2) HIS PHYSICIANS HAD MADE EVERY EFFORT TO ADVISE RESPONDENT OF THOSE NEEDS, (3) RESPONDENT WAS CALLOUSLY INDIFFERENT TO THOSE NEEDS, AND (4) RESPONDENT ACTUALLY HARMED Petitioner BY INDUCING WITHDRAWAL OF THE NARCOTIC AND SUBSEQUENTLY CAUSING OVERDOSE.

A Error in Granting Summary Judgment

It is well established that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be

believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge." Id.

In dismissing this case, the District Court Judge improperly ignored documentary evidence supplied by the Petitioner that showed that (1) the jail medical staff was informed of Petitioner's condition and pain medication regimen, and (2) the Petitioner had been filing written requests for medical attention that are in fact pathetic pleas for help overcoming the intense pain.

The District Court also assumed the role of trier-of-fact, improperly making findings of material facts that were in genuine dispute, including: (1) that Respondent did not receive a letter from Petitioner's regular physician advising of Petitioner's condition and offering instructions on the type and dosage of pain medication, and (2) that Petitioner's physician's failure to promptly call the jail justified Respondent's refusal to administer the pain medication, notwithstanding the fact that the medical records clearly indicate that another of Petitioner's physicians had already corroborated his need for pain medication.

B Standard for Deprivation of Constitutional Rights for Inadequate Medical Care for Pretrial Detainee.

The district court erred in concluding that the Respondent's refusal to continue the Petitioner's aggressive pain management – unnecessarily subjecting him to intense and unbearable pain and narcotic withdrawal for ten days; then abruptly resuming the medication at levels causing overdose – did not arise to the constitutional standard of "deliberate indifference" to Petitioner's serious medical needs while in custody.

Because prisoners are in the custody of the state and are unable to seek medical assistance, the state has a duty to provide adequate medical treatment for them. Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976). A pretrial detainee has a constitutional right to receive needed medical treatment and may not be subjected to any form of punishment, since he has not yet been adjudicated guilty of a crime. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-45 (1983).

As a pretrial detainee, Petitioner's claim for medical treatment is governed by the due process clause of the Fourteenth Amendment. Id. at 244. "A pretrial detainee makes out a due process violation if he shows 'deliberate indifference to serious medical needs.'" Gray v. Farley, 13 F.3d 142, 146 (4th Cir. 1993), *quoting*, Estelle v. Gamble, 429 U.S. 97, 104 (1976). This duty includes psychological services. Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). The Fourth Circuit has correctly admonished that "no legitimate punitive goal is served by . . . unreasonable delay in providing medical treatment where the need for such treatment is apparent." Martin v. Gentile, 849 F.2d 863, 871 (4th Cir. 1988).

"In the denial of medical treatment context, deliberate indifference culpability means two things: (1) a knowledge element satisfied by an official's actual knowledge of the serious medical needs – more precisely, he 'must be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.'" Hudson v. McHugh, 148 F.3d 859, 863 (7th Cir. 1998), quoting, Farmer v. Brennan, 511 U.S. 825 (1994).

A prisoner must show that he suffered from a serious disease or injury, that there was a substantial potential for harm if medical care was delayed or denied, and that such harm did result. Sosebee v. Murphy, 797 F.2d 179 (4th Cir. 1986). Prisoners may bring actions against prison doctors who refuse to treat them after a serious illness was brought to their attention. Estelle v. Gamble, 429 U.S. 97 (1976). Actions may also be brought against doctors for

administering medical treatment known to be ineffective. Kelly v. McGinnis, 899 F.2d 612 (7th Cir. 1990). In general, special medical needs of inmates must be recognized. See, Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989, cert. denied, 495 U.S. 932 (1990)(indifference to medical needs of paraplegic and physically incapacitated prisoners).

Under the standard set forth above, the defendant's own medical records indicate a notice of a serious medical condition and inadequate – or even unconscionable – response to it.

C. Respondent's Deliberate Indifference to Petitioner's Known Need for Pain Management.

The jail's own medical records reveal that an awareness that Petitioner was on a regular regimen of synthetic morphine for a degenerative bone and joint disease. Despite this information, the Respondent discontinued treatment and prescribed over-the-counter Motrin, which was virtually ineffective when compared to the narcotic MS-Contin.

Respondent's sole reason offered for failing to prescribe Petitioner morphine for first ten days of his detention was that "he did not appear to be in any pain." This ignores the facts that Petitioner arrived at the jail (1) walking with a cane, (2) carrying medication including MS Contin for pain, (3) delivering medical records from his treating physicians from his immediately preceding hospitalization for pain in connection with his degenerative bone disease. Respondent's statement also cavalierly ignores the facts that (1) the nursing staff confirmed with one of Petitioner's physicians the nature of his medical condition and the prescription for morphine, and (2) that Petitioner was regularly complaining of pain to the nursing staff and the Physician's Assistant.

In short, Respondent engaged in deliberate indifference by substituting his own subjective analysis of Petitioner's condition and the pain he was experiencing – based on a brief evaluation – rather than rely on the written description and oral documentation of his need for aggressive pain management with narcotics by his treating physicians.

The aforementioned conduct can quite reasonably be considered "deliberate indifference," even under the subjective manner in which the Supreme Court chose to define the term in Farmer v. Brennan, 511 U.S. 825 (1994). In that opinion, Justice Souter defined deliberate indifference in a subjective manner as meaning the failure to act when prison officials knew of a "substantial risk of serious harm," even when an inmate did not warn them of a particular threat and even if they did not believe that harm would occur to a particular inmate.

The Court explained: "[S]ubjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishment Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." Id.

In words that ring especially true in this case, Justice Blackmun concurred in Farmer, stating that the Court's opinion "sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly." Id. (Blackmun, J., concurring).

II. THE FOURTH CIRCUIT COURT OF APPEALS SHOULD HAVE APPLIED THE STANDARD APPLIED BY THE SEVENTH AND ELEVENTH CIRCUIT IN FACTUALLY-SIMILAR CASES AND DENIED SUMMARY JUDGMENT WHERE WITHOUT JUSTIFICATION THE JAIL PHYSICIAN SUBSTITUTED HIS OWN JUDGMENT FOR THAT OF THE PRE-TRIAL DETAINEE'S REGULAR PHYSICIAN WITH THE EFFECT OF UNNECESSARILY HARMING THE DETAINEE.

The Eleventh Circuit Court of Appeals case of Steele v. Shah, 87 F.3d 1266 (11th Cir. 1996), is factually similar and especially instructive in analyzing this case. In that case, inmate Steele had been diagnosed by a prison psychiatrist at Polk Correctional Institution in Florida with "adjustment disorder with anxious mood" and prescribed psychotropic drugs to control his condition. Steele was thereafter transferred to a new correctional facility, the Orange County Jail. Steele was presented before Dr. Shah, the psychiatrist at Orange, whose review of Steele's treatment plan and visit with him lasted no more than one minute. Whereupon, Dr. Shah announced that all of the psychotropic drugs were to be discontinued, and that Steele was "dismissed." Id. at 1267.

After the loss of the drugs, Steele suffered insomnia, anxiety and various bodily pains. He filed numerous grievances regarding the discontinuation of the drugs, but without successes. Steele also wrote letters to his former psychiatrist and psychologist at Polk. In response, the psychiatric nurse at Polk called the medical staff supervisor at Orange to make clear that Steele was considered a suicide risk. Despite this information, Dr. Shah kept Steele off the psychotropic drugs for the entire 182 days of Steele's incarceration at Orange. Thereafter, Steele was returned to Polk, whereupon he resumed talking the drugs. Id. at 1267-68.

Before returning to Polk, however, Steele filed an action under 42 U.S.C. § 1983 against Dr. Shah claiming that he exhibited deliberate indifference to his serious medical needs in peremptorily discontinuing Steele's medication

without actually examining Steele or reviewing his medical records. The district court granted Dr. Shah's motion for summary judgment, concluding "at best, Plaintiff has demonstrated a difference in medical opinion between Defendant and himself as to the latter's diagnosis or course of treatment, which does not support a claim of cruel and unusual punishment. The complaint and the medical records flatly refute any suggestion that Defendant ignored or abused Plaintiff or manifested deliberate indifference toward him." Id. at 1269.

Reversing the district court grant of summary judgment against Steele, the Eleventh Circuit concluded that:

> the conduct charged, if found in Steele's favor, would support a finding of deliberate indifference violative of constitutional rights. A jury accepting Steele's account of his encounters with Shah and of Shah's conduct would be entitled to find that Shah discontinued Steele's medication on the basis of one cursory interview and without having reviewed any medical records beyond the Treatment Plan sent over from the Polk facility. It could thus "conclude that [Shah] knew of a substantial risk from the very fact that the risk was obvious" and that Shah deliberately disregarded that risk. It could further find that in amply time to make a different medical judgment or at least to reconsider that made, Shah was aware from Polk personnel that Steele was considered by them to be a serious suicide risk, and that that was one basis for their prescription of the psychotropic drugs. We do not hold that such findings would compel an ultimate finding of deliberate indifference under *Greason* and *Farmer*, only that they would support such a finding. That suffices to demonstrate that on

> the summary judgment record there were genuine issues of material fact.

Id. at 1270.

The Steele v. Shah case is similar to the present case on several levels, First, Respondent failed to follow the treatment notes contained in the medical records that Petitioner brought to the jail and also the notes of the conversation between the nursing staff and Dr. Wilson, as recorded in the jail records. Respondent claims he did not see either medical records, but cannot excuse himself from liability by virtue of ignorance of the inmate's condition any more than Dr. Shah could escape liability for failing to review Steele's treatment plan established by his former psychiatrist at Polk.

Second, a medical difference of opinion can be foisted an excuse for deliberate indifference to serious medical needs. The affidavit of Petitioner's regular physician, Dr. Hawkins, indicates that not only did Respondent cause Petitioner to experience unnecessary pain, he caused Petitioner to endure excruciating withdrawal from the narcotic. Even if he believed that Petitioner should not have been on the MS-Contin, he should not have substituted his own judgment for that of Petitioner's regular physician, especially considering that Petitioner was a pre-trial detainee and would be released in short order.

Third, Respondent made matters worse –after causing unnecessary pain and withdrawal – by reversing course and resuming the medication at three times the dosage prescribed by Dr. Hawkins. Indeed, Respondent claims in his own affidavit that he simply took Petitioner's word for how much medication to prescribe.

In short, the course of Respondent's brief treatment of Petitioner proceeds from no medication, to withdrawal, and finally to overdose. At every step in this course of treatment, Respondent was acting contrary to the directions of

Petitioner's outside, regular physicians. Surely, this conduct exemplifies the legal definition of "deliberate indifference."

As the Seventh Circuit Court of Appeals stated in Hudson v. McHugh, 148 F.3d 859 (7th Cir. 1998) offered the following analysis in a similar fact pattern:

> Hudson's proposed amended complaint alleged that the jail intake officers and nurse (1) knew about his epilepsy -- because he told them during the intake interview and throughout the days before his seizure – (2) knew that he wasn't getting Dilantin-again, because he told them – and (3) still did nothing about it in the face of his repeated requests. While the district court found that this only stated a claim of negligence, we disagree; this is the prototypical case of deliberate indifference, an inmate with a potentially serious problem, repeatedly requesting medical aid, receiving none, and then suffering a serious injury.

Id. at 864.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fourth Circuit and, ultimately, to vacate and reverse the final judgment below and remand the matter to the District Court for trial.

Respectfully Submitted,

Scott Gregory Crowley
Counsel of Record
CROWLEY & CROWLEY
7201 Glen Forest Drive
Richmond, Virginia 23226
(804) 282-5303

No. 01-1570

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GEORGE H. SEYMOUR,
Plaintiff - Appellant,

versus

W. ANDREW REESE, M.D., Individually and
in his capacity as Medical Director of the
Pamunkey Regional Jail,
Defendant - Appellee.

November 29, 2001, Submitted

December 5, 2001, Decided

COUNSEL:
Scott Gregory Crowley, CROWLEY & CROWLEY, Richmond, Virginia, for Appellant.

Lynne Jones Blain, Jeremy D. Capps, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Glen Allen, Virginia, for Appellee.

JUDGES:
Before WIDENER, NIEMEYER, and WILLIAMS, Circuit Judges.

OPINION:

PER CURIAM:

George H. Seymour appeals from the district court's order granting summary judgment in favor of Defendant in this *42 U.S.C.A. § 1983* (West Supp. 2001) action in which Seymour asserted that the Defendant was deliberately indifferent to his serious medical needs. We have reviewed the parties' briefs, the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning

of the district court. Seymour v. Reese, No. CA-00-687-3 (E.D. Va. Mar. 30, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Civil Action Number 3:00CV687

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE H. SEYMOUR,
Plaintiff,

v.

W. ANDREW REESE, M.D.,
Defendant.

ORDER

This matter is before the Court on the defendant's motion for summary judgment. For reasons stated in the accompanying Memorandum Opinion, the defendant's motion for summary judgment is GRANTED and this matter is DISMISSED WITH PREJUDICE.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

DATE: March 30, 2001

SENIOR UNITED STATES DISTRICT JUDGE

Civil Action Number 3:00CV687

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE H. SEYMOUR,
Plaintiff,

v.

W. ANDREW REESE, M.D.,
Defendant.

MEMORANDUM OPINION

This matter is before the Court on the defendant's motion for summary judgment flied on February 20, 2001. The plaintiff filed a response and the defendant filed a reply. A hearing was held on March 23, 2001, and the plaintiff was given leave to submit additional documentation in opposition to the motion for summary judgment The matter is now ripe. For the reasons stated herein, the defendant's motion for summary judgment is granted.

George H. Seymour, the plaintiff ("Seymour" or "plaintiff"), filed a complaint against defendant W. Andrew Reese, M.D. ("Reese" or "defendant"), the Medical Director of the Pamunkey Regional Jail ("the Jail'), alleging that his Filth, Eighth and Fourteenth Amendment rights were violated by Reese while Seymour was a pretrial detainee at Pamunkey Regional Jail from October 20, 1998 through November 18, 1998. (Complaint). Seymour faced several state criminal charges in Hanover County, Virginia, the trial of which was scheduled for October 20, 1998. (Seymour Affidavit). On October 19, Seymour was transported by ambulance to Memorial Regional Medical Center. (Id.) Despite a motion to continue by his attorney and supporting medical documentation, the court issued a capias order for his arrest, revoking his bond. (Id.) Learning of the order, Seymour

presented himself to the magistrate and was taken into custody. (Id.) He arrived at Pamunkey Regional Jail at 4:39 p.m. on October 20. (Waddy Affidavit). At the time he arrived, Seymour had with him a bottle of pills labeled Prozac but containing several different kinds of medication. (Undisputed Facts, Defendant's Memorandum in support of Motion for Summary Judgment)[1]. The Jail staff took the bottle and its contents. (Id.) Seymour also gave the Jail staff a list of medications which included Oxycodone, Prozac, Quinine Sulfate, Clonazepam, Trazadone, and Zanafiex. (Id.) On the evening of October 20, the nursing staff of the Jail contacted Peter Ober, the physician assistant, regarding Seymour's medications. (Id.) The nursing staff told Ober what medications were on the list, and Ober advised that none of it was needed as soon as possible but asked the nursing staff to verify Seymour's current medications with his treating physicians. (Id.) On October 21, Hanover Mental Health verified that Seymour was taking Prozac but that the Trazadone had been discontinued. (Id.) On October 21, Dr. James Brodeur verified that Seymour was prescribed Quinine Sulfate and Clonazepam. (Id.) On October 21 at 1:30 p.m., the nursing staff ordered Prozac, Quinine Sulfate and Clonazepam. (Id.) On October 21, at 3:30 p.m., the nursing staff told Ober that Seymour was complaining of pain so Ober prescribed prescription strength Motrin 800 mg three times per day. (Id.) Because the medications were ordered from a mail-order pharmacy, the four medications were received and Seymour was started on the medications on October 23. (Id.) Another of Seymour's treating physicians, Dr. Jeffrey Wilson of West End Orthopedic, returned a call to the nursing staff on October 21 and advised that Seymour had been on Morphine — MS Contin for several months for a hip problem, but Dr. Wilson advised that Dr. Hillary Hawkins prescribed the Morphine and was controlling Seymour's path management (Id.) The nursing staff called Dr. Hawkins' office to verify the prescription but Dr. Hawkins did not return that call nor another call placed on October 22, 1998. (Id.)

On October 23, 1998, Dr Reese saw Seymour for the first time. (Id. and Reese Deposition). Dr. Reese noted that

Seymour did not appear to be in pain but assessed him as having chronic pain that was mild; Reese prescribed Motrin 800 mg three times per day (Undisputed Facts, Defendant's Memorandum in support of Motion for Summary Judgment). Dr. Reese also asked that Seymour's records from Dr. Hawkins be obtained. (Id.) On October 30, a corrections officer called a nurse to assess Seymour in his cell, based on Seymour's complaint that he could not feel his legs and could not move them. (Id.) The nurse examined Seymour, noted that both legs were warm and had normal pulses, and noted that Seymour was not moaning or indicating any visible signs of pain. (Id.) The nurse gave Seymour Motrin 800 mg. (Id.) Dr. Reese examined Seymour for the second time on October 30, noting that Seymour did net appear to be in any pain. (Id. and Reese Deposition). Dr. Reese also determined that Seymour bad been prescribed MS Contin 30mg by Dr. Hawkins and decided to follow her recommendation since she was his long-standing treating physician. (Id.) Dr. Reese discussed with Seymour how often he was taking the MS Contin 30mg and prescribed the MS Contin 30mg three times per day based on Seymour's response. (Id.) On November 2, 1998, the nursing staff verified with Seymour's pharmacy that he was previously prescribed MS Contin 30 mg to be taken every eight hours. (Undisputed Facts, Defendant's Memorandum in support of Motion for Summary Judgment). Seymour was started on the MS Contin 30mg, and the Motrin 800mg was stopped, on November 3, 1998. (Id.) At the same time, Seymour was moved to the medical unit at the Jail for observation and to ensure his safety. (Id.) He remained in the medical unit until he was released on bond on November 18, 1998. (Id.) While in the medical unit, Seymour had no significant evidence of pain and did not show any adverse effects from the pain medication. (Id. and Reese Deposition).

Following the hearing, the Court allowed the plaintiff to file a supplemental response to the motion for summary judgment. The supplemental response includes deposition transcripts from the depositions of Dr. Reese and Mr. Ober, as well as an affidavit from Dr. Hawkins, all of which the Court has reviewed. In her affidavit, Dr. Hawkins states that

she prepared a letter for Ms. Tammy Belcher, a fl-lend of the plaintiff; to deliver to the Jail. The record is not clear that this letter was actually delivered to the Jail by Ms. Belcher but Dr. Reese states in his affidavit that he never saw the letter from Dr. Hawkins. (Reese Transcript, pp 54-55). Dr. Reese's statement that he never saw the letter is consistent with his other deposition testimony as well as the medical records from the Jail which do not indicate the receipt of such a letter.

II. LEGAL ANALYSIS

Summary judgment may be granted if, after consideration of such items as depositions, affidavits and pleadings, and after viewing the facts in the light most favorable to the non-moving party, "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The legal standard against which the Court must measure the complaint and the pending motion for summary judgment was established by the United States Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). "A scintilla of evidence in support of the plaintiff's position will be insufficient [to overcome summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252. The party opposing summary judgment may not rest on mere allegations or denials. Id. at 256. It must produce "significant probative evidence tending to support the complaint" or provide "specific facts showing that there is a genuine issue for trial." Id.

The Court ruled at the hearing that, because the defendant was a pretrial detainee, the Fourteenth Amendment, not the Fifth Amendment or the Eighth Amendment, governs his claims.

Therefore, the defendant's motion for summary judgment is granted as to the plaintiffs Fifth Amendment and Eighth Amendment claims.

The applicable standard for determining whether there is a violation of the Fourteenth Amendment is whether the defendant was "deliberately indifferent" to the detainee's "serious medical needs-" "[D]eliberate indifference to the serious medical needs of a pretrial detainee violates the due process clause." Young v. City of Mount Ranier, 238 F.3d 567, 575 (4th Cir. 2001). 'Deliberate indifference is a very high standard a showing of mere negligence will not meet it." Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999), cert. denied, 529 US. 1067. "[T]he Constitution is designed to deal with deprivations of rights, not errors in judgment, even though such errors may have unfortunate consequences. This is precisely why the Supreme Court has seen fit to stress that deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety." Id. at 695-96. "[T]o establish a claim of deliberate indifference to medical need, the need must be both apparent and serious, and the denial of attention must be both deliberate and without legitimate penological objective." Id. at 695.

With this standard in mind, the Court has examined the facts of this case, In its supplemental response, plaintiff lists what it claims are "issues of material fact."[2] First, plaintiff states that contrary to Dr. Reese's claims that Seymour did not appear to be in pain, did not complain of pain, and did not advise him that he was on Morphine for pain, Seymour did complain of pain both to the nurse and to Dr. Reese. Next, plaintiff argues that although Reese claims that Seymour's medical chart was not available to him, Reese does not explain how he knew to prescribe the medicines that Mr. Ober could not prescribe. Next, plaintiff states that Reese denies that Seymour told him he was on MS Contin or Percocet for pain management. Plaintiff also states that Reese's minimization of the effect of withdrawal pain is contradicted by Dr. Hawkins' affidavit. Next, plaintiff describes Dr. Reese as "reversing course" and prescribing the

MS Contin, based on Dr. Hawkins' having been prescribing that medication and Nurse Barlow's telling Dr. Reese that Seymour would be released soon The other issues plaintiff raises are Dr. Reese's statement as to the effect of Motrin on pain versus the effect of Morphine en pain, why Dr. Reese cannot explain Seymour's pleas for medication on his sick call requests given his assessment that Seymour does not appear to be in pain, and why he let Seymour determine how much MS Contin he should take.

The record establishes that the defendant is entitled to summary judgment on plaintiff's remaining Fourteenth Amendment claim. After viewing the facts in the light most favorable to the plaintiff, and assuming that the plaintiff was in pain that was greater than the "mild, chronic pain" described by Dr. Reese, the Court holds as a matter of law that these facts cannot establish a deliberate denial of medical attention. To the contrary, the medical records from the Jail establish conclusively that the medical staff responded promptly to Seymour's concerns and requests. In fact, although Dr. Hawkins does not address this in her affidavit or the October 27 letter she prepared for Ms. Belcher, the delay in Seymour receiving the Morphine was due in part to the fact that neither Dr. Hawkins nor anyone in her office returned the telephone calls placed to her office on October 21 and 22 by the Jail nursing staff. See Medical Records, Exhibit A, page 12, attached to Defendant's Memorandum in Support of Motion for Summary Judgment.

The records establish that the medical staff promptly attempted, under the direction of Dr. Reese and Mr. Ober, to verify the medications Seymour was taking. By 1:30 pm. on October 21, 1998, less than, twenty-four hours after Seymour's arrival at the Jail, the nursing staff had verified three medications and ordered them. Two hours later, at 3:30 pm., the nursing staff spoke with Ober concerning Seymour's pain complaints and ordered the Motrin 800mg as well. At 3:45, the nursing staff spoke with Dr. Wilson's office, which directed the nurse to contact Dr. Hawkins regarding Seymour's pain management. This was done immediately but

no one was available in Hawkins' office to provide the requested verification. The record indicates that a second call was placed to Dr. Hawkins' office on October 22 and that neither call was returned. Medical Records, Exhibit A, pp. 11-12. Beginning on October 23, the plaintiff received Motrin 800 mg, Prozac 20 mg, Quinine Sulfate 325 mg, and Clonazepam 1mg.[3] Thus, the records establish that the medical staff, under Dr Reese's direction, responded promptly to Seymour's need for medication, including pain medication.

The other issues plaintiff raises in his supplemental opposition do not constitute "genuine issues of material fact." With regard to plaintiff's allegation that Reese does not explain how he knew which medications to prescribe, the records establish that the nursing staff reviewed the list of medications that Seymour gave them with Ober and, pursuant to directions from Ober, verified those medications and the appropriate dosage with Seymour's prescribing physicians. Reese stated in his deposition that one of the nurses told him that Seymour had been taking MS Contin as one of his routine medications prior to his arrival at the Jail. Reese then discussed the medication with Seymour and deferred to Dr. Hawkins' determination that Seymour's pain was best managed with MS Contin. While plaintiff describes this as Dr. Reese's "reversing course," Dr. Reese's decision was based on several factors, all of which were reasonable under the circumstances. Having reviewed the record completely, the Court concludes that none of Dr. Reese's decisions, actions or inactions with regard to the plaintiffs medical needs constitutes "deliberate indifference."

III. CONCLUSION

For these reasons, the Court will grant the defendant's motion for summary judgment and this matter will be dismissed with prejudice.

An appropriate Order shall issue

DATE March 30, 2001

SENIOR UNITED STATES DISTRICT JUDGE

Footnotes

[1]The Undisputed Facts contain citations to the specific affidavit and/or other document(s) that supports the stated fact.

[2] The Court notes that the defendant, as required by Local Rule 56, listed the undisputed facts. The local rule also requires the responding party to include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record that support those facts. Plaintiffs counsel did not do this in his initial response.

[3] Other medications were begun in November, including the MS Contin 30mg that was substituted for the Motrin 800 mg on November 3 and three other medications. Medical Records, Exhibit A, p. 19.

Case number: 3:00CV687

UNITED STATES DISTRICT COURT
Eastern DISTRICT OF Virginia
Richmond Division

George H. Seymour,
Plaintiff,

v.

W. Andrew Reese, M.D.,
Defendant.

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. *This action came before the Court and a decision has been rendered..

IT IS ORDERED AND ADJUDGED that the defendant's motion for summary judgment is GRANTED and this matter is DISMISSED WITH PREJUDICE.

Date March 30, 2001

Norman H. Meyer. Jr.
Clerk
(By) Deputy Clerk

UNPUBLISHED

No. 01-1570

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GEORGE H. SEYMOUR,
Plaintiff Appellant,

v.

W. ANDREW REESE, M.D., Individually and in his capacity as Medical Director of the Pamunkey Regional Jail,
Defendant Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-00-687-3)

Submitted; November 29, 2001 Decided: December 5, 2001

Before WIDENER, NIENEYER, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Scott Gregory Crowley, CROWLEY & CROWLEY, Richmond, Virginia, FOR Appellant. Lynne Jones Blain, Jeremy 0. Capps, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Glen Allen, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM;

George H. Seymour appeals from the district court's order granting summary judgment in favor of Defendant in this 42 U.S.C.A. § 1983 (West Supp. 2001) action in which

Seymour asserted that the Defendant was deliberately indifferent to his serious medical needs. We have reviewed the parties' briefs, the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court.

Seymour v. Reese No. CA—00-687-3 (E.D. Va. Mar. 30, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Supreme Court U.S.
FILED
APR 8 2002
OFFICE OF THE CLERK

(2)

No. 01-1301

IN THE

Supreme Court of the United States

GEORGE H. SEYMOUR,

Petitioner,

v.

W. ANDREW REESE, M.D., individually and in his capacity as Medical Director of the Pamunkey Regional Jail,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

DAVID P. CORRIGAN
Counsel of Record
LYNNE JONES BLAIN
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Attorneys for Respondent
P.O. Box 70280
Richmond, Virginia 23255
(804) 747-5200

173351

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

I. Is there a division among the Circuit Courts about what constitutes deliberate indifference to a serious medical need?

II. Did the United States Court of Appeals for the Fourth Circuit reversibly err in affirming the district court's grant of summary judgment in favor of Dr. Reese on the grounds that Dr. Reese was not deliberately indifferent to Petitioner's serious medical need?

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Rule:

Sup. Ct. R. 10 7

STATEMENT OF THE CASE

This case involves medical treatment received by Petitioner George Seymour ("Petitioner" or "Seymour") from members of the medical staff at the Pamunkey Regional Jail ("the jail") while he was a pretrial detainee. In his Complaint, Seymour alleged that W. Andrew Reese, M.D. ("Dr. Reese") was deliberately indifferent to his serious medical needs while Seymour was detained. Seymour did not sue any of the other medical providers involved in his care.

The District Court granted summary judgment to Dr. Reese finding that no genuine issue of material fact existed as to Petitioner's claim and that, based upon those facts, Dr. Reese was not deliberately indifferent to Seymour's serious medical needs. The Fourth Circuit Court of Appeals affirmed the District Court's decision.

I. Clarification Of The Record

The underpinnings of Seymour's claim are that he was on MS Contin[1] when he arrived at the jail, that he had been on it for an extended period of time and that he provided documentation of this to the medical staff during the early days of his detention. Petitioner's Statement of the Facts is riddled with material misstatements with regard to these facts.

Petitioner suggests that he did not appear for his hearing — necessitating the issuance of the capias which resulted in his detention — because he was hospitalized on October 20, 1998. However, the medical records from Bon Secours Memorial Regional Medical Center indicate that he was admitted on October 19, 1998 and discharged the same day.

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1. MS Contin is the prescription name for synthetic morphine.

(Jt. App. p. 63-64) Further, while Seymour claims he brought his Bon Secours records to the jail with him, and that Dr. Reese was deliberately indifferent for not reviewing them, Seymour presented no evidence that the jail medical staff received any medical records from the October 19, 1998 Emergency Room admission.

The October 19, 1998 Rescue Squad records show that Seymour told the Rescue Squad that he was taking the following medications: Carb/Levo, Trazadone, Endocet, Prozac, and Glucosamine. (Jt. App. p. 65) Seymour did not report that he was taking morphine at that time. Upon arrival at Bon Secours, Seymour reported the same information to the nurse. Again, no report of morphine. (Jt. App. p. 67)

While at Bon Secours, the ER physician treated Seymour for leg pain and numbness and discharged him the same day at 3:35 p.m. The doctor gave Seymour a prescription for MS-Contin 30 mg. to be taken three times per day. (Jt. App. pp. 70-71) Contrary to Petitioner's statement, the evidence showed that he had not been on morphine for more than one day before his detention at the jail.

Within hours of his incarceration, the nursing staff contacted Peter Ober, Dr. Reese's physician assistant, regarding Seymour's medication[2]. (Jt. App. p. 123) Ober reviewed the list of medications and advised that these medications were not needed as soon as possible. (Jt. App. p. 27) Instead, Ober asked the nursing staff to verify the patient's medication with his treating physicians. Quite, appropriately, Ober did not want to order the medication without either verification or formal prescriptions with a physician's signature. (Jt. App. p. 29)

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2. At the time of his detention, Seymour gave the jail staff a list of medications he was supposedly taking.

Petitioner claims that the medical staff, including Dr. Reese, unreasonably failed to heed the instructions of Petitioner's treating physicians. However, Petitioner neglected to include in his statement of facts that the nursing staff at the jail called each of Petitioner's physicians to verify the medication prescribed by each of them to the Petitioner. The information Petitioner relates about Dr. Jeffrey Wilson is typical of the Petitioner's misstatements of fact. Petitioner claims that Dr. Reese should have prescribed morphine based upon the information Dr. Wilson's staff provided. Significantly, the record establishes that Dr. Wilson's office returned the jail nursing staff's call and advised that Seymour was being worked up for a left hip replacement planned within the next month. Dr. Wilson's office further advised that inmate [Seymour] has been on MS Contin for several months *"however is prescribed by another physician. Dr. J. Hawkins is controlling his pain management."* (Jt. App. p. 124, emphasis added) By his own report, Dr. Wilson did not and had not prescribed morphine to Seymour, did not provide the jail staff with dosage information and was not the treating physician for purposes of Seymour's pain management.

The nursing staff made many calls in an attempt to provide Seymour with the proper medication at the proper dosage. First, the nursing staff called Hanover Mental Health to verify Seymour's medication. The doctor confirmed that Seymour was to receive Prozac; the Trazadone which Seymour claimed he should be given and which was on his list had been discontinued. (Jt. App. p. 123) The nursing staff also called another physician — Dr. Brodeur — and confirmed the prescription for Quinine Sulfate and Clonazapam. These medications were then ordered from the pharmacy who supplied the jail. (*Id.*) The staff also called Dr. Wilson as discussed above. Based upon the report from

Dr. Wilson, the staff then called Dr. Hawkins to obtain medication and dosage verification on the morphine. A message was left but no return call was received. The nursing staff called again on October 22, 1998 and left a second message. No return call was received. (Jt. App. p. 123-124)

The nursing staff contacted Ober on October 21, 1998, at 3:30 p.m. to advise that Seymour was complaining of pain. Accordingly, Ober ordered *prescription strength* Motrin 800 mg three times per day. (Jt. App. p. 123) Petitioner incorrectly states that he was given an over-the-counter pain reliever.

Seymour also seeks to minimize Dr. Reese's efforts at his first visit with Seymour. The note from the October 23, 1998 visit reflects that Dr. Reese took a history from Seymour, conducted a physical examination, and observed Seymour moving around — all of this in response to Seymour's complaints of leg pain. Dr. Reese concluded that Seymour was mildly tender and did not appear to be in pain. He recommended continuing the current prescription medication - Motrin 800 mg. He also specifically stated that he needed the records from [Dr.] Hawkins. (Jt. App. p. 132) Based upon this examination, Dr. Reese did not believe Seymour needed to be on morphine. (Jt. App. pp. 20, 132)

Petitioner's recitation of the facts with regard to this exam and the prescriptions is quite simply wrong. He states "[t]he prescription given by respondent to continue the Motrin 800 went against the prescription of Petitioner's physician which had already been confirmed by Dr. Wilson and included in the nursing staff's notes, that Petitioner be given MS Contin." (Pet. Br. p. 4) First, Dr. Wilson did not indicate that Petitioner should be given MS Contin — only that he had been on it. Second, he stated that Dr. Hawkins

was the physician addressing Seymour's pain management needs. As of October 23, 1998, Dr. Hawkins had not returned the phone calls to verify either the medication or the dosage — hence the need expressed by Dr. Reese to get Dr. Hawkins' records.

Part of Petitioner's claim against Dr. Reese is that he suffered from withdrawal as a result of Dr. Reese's failure to prescribe morphine. He suggests that as of October 26, 1998 he was suffering the symptoms of withdrawal. However, there is no such evidence in the medical records. Further, as of the date of his detention, the evidence establishes that Petitioner had been on MS Contin for *only one day*. Petitioner presented no evidence that removal of MS Contin after one day would lead to withdrawal symptoms.

Petitioner makes much ado about the letter Dr. Hawkins wrote at the request of Petitioner's friend. Petitioner states that the letter was delivered to the jail on October 26, 1998, yet the letter is dated October 27, 1998. Further, there is not one shred of evidence that it was ever received by the jail. Petitioner's friend did not provide an affidavit to that affect and the medical records do not contain the letter. Finally, Dr. Reese denies ever seeing the letter. Even if he had seen the letter, it states that Seymour was not on MS Contin at the time he was detained at the jail. Instead, Dr. Hawkins states that she prescribed Percocet on October 16, 1998, just four days before his detention.

With regard to the evaluation on October 30, 1998, Petitioner again misstates the facts as they exist in the record. On that date, Dr. Reese had the benefit of Seymour's prior medical records, which confirmed the prescription for MS Contin. (Jt. App. pp. 49-114) Dr. Reese did not reverse

course but merely reacted to the additional information obtained at his request. Further, while Dr. Reese did indeed ask Seymour about the dosage of MS Contin, he did not give Seymour any MS Contin until he verified the dosage with the pharmacy who filled the prescription. Note that the dosage given is the exact amount prescribed by the Emergency Room physician at Bon Secours on October 19, 1998. (Jt. App. p. 71)

Petitioner suggests that after beginning to receive the MS Contin he suffered from hallucinations. There is no documentation, however, of any such condition at any time during Seymour's detention. On November 2, 1998 at 1:30 p.m., the nursing staff verified with Seymour's pharmacist that he had been prescribed MS Contin 30 mg every eight hours. (Jt. App. p. 38) The nursing staff started the MS Contin on November 3, 1998. (Jt. App. p. 139) At the same time, Seymour was moved to the medical unit for direct observation by the nurses and to ensure immediate availability of medical care to assist him if he had any problems. (Jt. App. pp. 69, 126) Seymour remained in the medical unit until he was bonded out on November 18, 1998. (Jt. App. pp. 131, 137) While in the medical unit, Seymour functioned normally, had no significant evidence of pain and showed no distress. Neither did he show any episodes of adverse effects of the pain medication. (Jt. App. pp. 41, 126, 127-129 and 130-131)

Seymour relies heavily on Dr. Hawkins' Affidavit to support his argument that a jury issue existed as to deliberate indifference. (Pet. Br. pp. 5-6) However, Dr. Hawkins' Affidavit is suspect for a number of reasons. First, she complains that Dr. Reese did not prescribe MS Contin yet did not have the professional courtesy to respond to phone calls requesting verification of the prescription. Second, she

suggests that Seymour may have suffered withdrawal because of the length of time he had been on MS Contin, yet her own October 27, 1998 letter attached to the Affidavit indicates that she was not prescribing MS Contin for Seymour at the time of his detention. Third, while the dosage prescribed by Dr. Reese exceeded what Dr. Hawkins may have chosen to prescribe, it was the exact amount prescribed by the Emergency Room physician. Finally, Dr. Hawkins is quick to opine that Dr. Reese was deliberately indifferent, yet deliberate indifference requires an understanding of the subjective knowledge of Dr. Reese. Dr. Hawkins, however, was not provided with any information regarding the information available to Dr. Reese during Seymour's detention.

REASONS FOR DENYING THE WRIT

I. Seymour Has Not Articulated A Compelling Reason To Justify A Discretionary Review By This Court

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner argues that a compelling reason exists because there is a conflict among the Circuit Courts on the standard applicable to these types of cases. However, the only two cases he cites, *Steele v. Shah*, 87 F.3d 1266 (11th Cir. 1996)[3] and *Hudson v. McHugh*, 148 F.3d 859 (7th Cir. 1998), do not depart from well-settled principles established by this court and other circuits regarding the standard applicable to claims of deprivation of constitutional rights as a result of medical care or the lack thereof.

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3. The decision as cited was amended by opinion dated September 5, 1996. The amended opinion can be found at 1996 U.S. App. LEXIS 23301.

In *Steele* and *Hudson*, the Circuit courts applied the well-established "deliberate indifference" standard and found that the facts of those cases did not justify a ruling in the defendant's favor on summary judgment. Key to the courts' decisions was the undisputed evidence that the defendants had actual knowledge of the inmates' serious medical need and, armed with that knowledge, did nothing about it. These decisions do not support the conclusion that there is a split in the Circuits on the applicable substantive law.

In fact, the language of those decisions tracks both the decisions of this court and of the Fourth Circuit Court of Appeals. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Young v. City of Mt. Ranier*, 238 F.3d 567 (4th Cir. 2001). Indeed, it is identical to the analysis of the District Court and Fourth Circuit in this case. (Pet. Br. 1a-11a)

Seymour has not provided this court with any compelling reasons for this Court to exercise discretionary jurisdiction over his appeal of the grant of summary judgment to Dr. Reese and the petition should therefore be denied.

II. The Lower Courts Did Not Err In Deciding This Case

Dr. Reese provided Seymour medical care which included a conscientious and deliberate course of examinations, verification of prescriptions and provision of necessary medical treatment, all done in a timely fashion. There is no evidence that Dr. Reese was deliberately indifferent to Seymour's need for pain medication and thus violated Seymour's Fourteenth Amendment rights. The District Court and Fourth Circuit correctly granted summary judgment in Dr. Reese's favor.

Only governmental conduct that "shocks the conscience" is actionable as a violation of the Fourteenth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998); *Young v. City of Mt. Ranier*, 238 F.3d 567 (4th Cir. 2001). Accordingly, in a case such as this one, where a plaintiff asserts a claim for failure to provide medical care, a state actor's conduct that amounts to "deliberate indifference" of the plaintiff's serious medical needs is viewed as sufficiently shocking to the conscience to support a Fourteenth Amendment claim. *Young*, 238 F.3d at 574-575.

Deliberate indifference requires a showing that the defendant actually knew of and disregarded a substantial risk of serious injury to the detainee *or that they actually knew of and ignored a detainee's serious need for medical care. Id.*, at 575; *See White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) ("A claim of deliberate indifference . . . implies at a minimum that defendants were plainly on notice of a danger and chose to ignore the danger notwithstanding the notice."); *see also Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (A prison official cannot be found liable . . . for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to an inmate's health or safety.) Thus, in order to establish a claim of deliberate indifference to a medical need, the need must be both apparent and serious, and the denial of attention must be both deliberate and without legitimate penological objective. *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999).

Even a cursory review of the Statement of Facts reveals that there was no denial of attention, no knowledge of a substantial risk of injury and no effort to ignore a serious need for medical care.

Seymour argues that Dr. Reese's deliberate indifference arises from three separate acts: first, his failure to follow treatment notes contained in the medical records; second, that Dr. Reese should not have substituted his own judgment for that of Seymour's treating physicians; and third, that Dr. Reese resumed the morphine at three times the level prescribed by Dr. Hawkins. In support, Seymour offers his own Affidavit, selected medical records from Seymour's stay at the jail, and a letter and affidavit from Dr. Hawkins for support. Yet, as discussed above, none of these items of evidence supports Seymour's claim that Dr. Reese's medical treatment was "so grossly incompetent, inadequate or excessive so as to shock the conscience or to be intolerable to fundamental fairness." *Miltier v. Beorn*, 896 F.2d 848 (4th Cir. 1990).

Deliberate indifference is a very high standard and a showing of mere negligence will not satisfy this standard. *Grayson*, 195 F.3d at 695; *Young*, 238 F.3d at 575. Seymour failed to prove that Dr. Reese *actually knew of and ignored* his *serious need for medical care. Young*, 238 F.3d at 575. The record fails to establish a genuine issue of material fact in this regard. Instead, as evidenced by the medical records and supporting affidavits, and even Seymour's Affidavit, Dr. Reese was responsive to Seymour's complaints, saw him on each occasion that he was requested to do so, prescribed medication as indicated, requested necessary information from Seymour's physicians, and arranged for Seymour to be admitted to the medical unit for close observation.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

DAVID P. CORRIGAN
Counsel of Record
LYNNE JONES BLAIN
HARMAN, CLAYTOR, CORRIGAN
& WELLMAN
Attorneys for Respondent
P.O. Box 70280
Richmond, Virginia 23255
(804) 747-5200